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No. 84-1187

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE MEDICAL AND DENTAL STAFF
OF YORK HOSPITAL,

Petitioner,

v.

MALCOLM WEISS,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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I. Introduction.

In an effort to support the unprecedented analysis and conclusions of the court of appeals and underplay the significance of the court's decision, Weiss resorts to fanciful distortions of the record. Weiss, for example, attempts to portray York Hospital's processing of his application as a "witch hunt" directed at osteopaths. This is belied by the uncontradicted evidence that every other osteopath who applied to York Hospital was granted staff privileges and by the concerns about Weiss's professional competence and ability to work with others that surfaced in Weiss's reference letters. *See* Pet. at 4-7.

In an effort to refute that this is the first case to find a hospital staff privileges decision to be a violation of section 1 of the Sherman Act under a per se theory or otherwise, Weiss lamely suggests that *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), also was such a case and that it did not chill meaningful physician participation in the staff privileges process.[1] RB at 9-12. *American Medical Ass'n* has nothing to do with the issues herein.[2] Antitrust liability in that case was not predicated upon a hospital's

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1. Weiss also argues that the court of appeals' decision will not encourage meritless claims because the cost of antitrust litigation and Federal Rules of Civil Procedure 11 and 56 will act as "prophylactics" against such claims. RB at 12-13. Weiss misses the point. Because of the court of appeals' decision, every disappointed staff privileges applicant (and his or her attorney) will know that an antitrust suit will not be disposed of before trial and that the burden of proof at trial has been substantially eased. *See* Pet. at 14-15. This knowledge (and the enhanced prospects of recovery, settlement, and attorneys' fees) can only encourage antitrust challenges to staff privileges decisions.

2. In *American Medical Ass'n*, two separate corporations were found and shown to have conspired to destroy a competitor, an offense the corporations conceded was supported by substantial evidence. *American Medical Ass'n*, 317 U.S. at 532-33. The only issue in that case was whether the conceded restraint was of "trade" within the meaning of the Sherman Act.

staff privileges decision; there was no finding of per se liability; and there was no holding that the activities of a hospital medical staff automatically satisfy the concerted action requirement of section 1 of the Sherman Act.

Weiss also argues this case is not like *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984) (No. 83-1368), in which this Court will review whether per se antitrust liability can be imposed without analysis of the purpose or effect of the alleged restraint. Weiss does not dispute that, as in *Northwest Wholesale Stationers, Inc.*, there was no analysis by the court of appeals, and no supporting evidence, of any pernicious, adverse effects on competition.[3] But Weiss argues that the facts herein fit the description of a "group boycott" and can conclusively be presumed to have anticompetitive effects.[4] RB at 24-26. This, however, was the same reasoning used by the Ninth Circuit in *Northwest Wholesale Stationers*,

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3. The court of appeals never examined whether the alleged exclusion of osteopaths from York Hospital would have any effect on the price, quantity, or quality of medical services provided in York County. It was in this context that the York Medical Staff noted the economic distinctiveness of the health care industry. *See* Pet. at 24-25. Because of the economic peculiarities of the health care industry, the alleged exclusion of osteopaths from York Hospital will not have the anticompetitive impact "normally" associated with such exclusionary conduct (i.e., effects on the price, quality, or quantity of medical services), and it makes little sense to apply the "normal" per se rule. *See also Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1566-69 (1984).

4. The only anticompetitive effect ever claimed by Weiss — injury to osteopaths by virtue of their alleged exclusion from York Hospital — is not the type of anticompetitive effect that justifies Sherman Act scrutiny. As this Court has repeatedly "made clear," the "antitrust laws . . . were enacted for the 'protection of *competition*, not *competitors*.'" *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 n.14 (1984) (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Inc., the propriety of which is now being reviewed by this Court.[5]

Weiss also challenges certain of the legal arguments in the petition. As demonstrated below, Weiss's analysis is inaccurate.

II. The York Medical Staff cannot automatically be deemed an antitrust combination.

Weiss argues that because each physician member of the York Medical Staff is an "independent economic entity," the York Medical Staff is conclusively "deemed to be a combination . . . within the ken of Section 1." RB at 22. Weiss also suggests that the York Medical Staff's concerted action argument rests solely on the "legal conceptualization" that the members of the York Medical Staff were required to act as agents for the benefit of York Hospital, an approach that purportedly was rejected by this Court in *Copperweld Corp.* RB at 20-21. Weiss's analysis mischaracterizes the York Medical Staff's position, the decision in *Copperweld Corp.*, and the "independent personal stake" exception to the intra-enterprise conspiracy doctrine.

The York Medical Staff's argument is that: in performing credentialing functions, the members of the York Medical Staff were required to act on behalf of and for the benefit of York Hospital; there was no finding or evidence that they acted otherwise; and, accordingly, there was no concerted action by the members of the York Medical Staff in this case. The York Medical Staff does not suggest that members of medical staffs cannot conspire with each other in any circumstances. But neither does the law afford Weiss the conclusive presumption of concerted action that the

5. Contrary to Weiss's suggestion, the York Medical Staff is not arguing that all group boycotts should be judged under the rule of reason; its position is that mechanistic extension of the per se rule, unsupported by any economic analysis, is contrary to decisions of this Court. *See* Pet. at 23-25.

court of appeals has given him.[6] Instead, under the "independent personal stake" exception, Weiss has the affirmative burden of establishing that, while participating in York Hospital's credentialing process, particular physician members of the York Medical Staff acted for their own economic interests and outside the interests of York Hospital.[7]

Weiss does not dispute that there was no such evidence or that, as to the only identified participants in the credentialing process (the ten individual physician defendants), the jury specifically found they had not acted for their personal interests or in their individual capacities. *See* Pet. at 10-11, 19-20. These defects cannot be cured through a conclusion of law that, because the physician members of medical staffs (being "independent economic entities") may, in certain other circumstances and at certain other times, have an "independent personal stake," all medical staffs, therefore, are automatic antitrust combinations.

Weiss also erroneously suggests that *Copperweld Corp.* renders irrelevant, for purposes of the concerted action inquiry, whether an agent is acting for his own benefit or in the interests of his principal. RB at 21. *Copperweld Corp.* itself preserves and relies upon the concept of "benefit" in holding that a wholly owned subsidiary, which "acts for the benefit of the parent," cannot conspire with its parent. *Copperweld Corp.*, 104 S. Ct. at 2742.[8]

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6. Inasmuch as physicians with staff privileges are required by federal and state law to join medical staffs and to participate in the staff privileges decision-making process on behalf of their hospitals, *see* Pet. at 7-9, it is inconsistent to presume conclusively that in so doing members of medical staffs are acting in their own interests.

7. Contrary to Weiss's implication, defendants did not have the burden of disproving the existence of an "independent personal stake" or of affirmatively proving they acted in the interests of York Hospital. Concerted action is an element of Weiss's case and, as such, the burden rested upon him to prove it. *See* Pet. at 19-20.

8. Similarly, Weiss's citation of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), is inapposite. This Court in *Hydrolevel Corp.* held only that a principal could

III. York Hospital unilaterally made all staff privileges decisions.

In its petition, the York Medical Staff argued that, because York Hospital was the ultimate decision maker in the staff privileges process and was found by the jury not to have conspired with anyone, the concerted action requirement of Sherman Act section 1 cannot be satisfied.[9] Pet. at 21-22. Weiss questions the factual predicate of this argument by suggesting that York Hospital "delegated all [staff privileges] decision making responsibility" to the York Medical Staff.[10] RB at 2, 18.

It is not necessary for this Court to become involved in the factual imbroglio whether the York Medical Staff or York Hospital had the power to make staff privileges decisions. The jury resolved this issue against Weiss by specifically finding that the York Medical Staff had "no power" to exclude competitors. *Weiss v. York Hospital*, 548 F. Supp. 1048, 1052 (M.D. Pa. 1982) (Finding of Fact No. 14). (A-100).

NOTES *(Continued)*

be liable for the antitrust violations of its agents acting with apparent authority; no conspiracy issue was presented or decided in that case.

9. Contrary to Weiss's contention, the record is replete with evidence that York Hospital's lay Board of Directors made all staff privileges decisions. (3811a; 5956a; 5959a-5970a; 5979a-5980a). Even if this were not in the record, defendants nonetheless would be entitled to a presumption (which was never rebutted by Weiss) that they complied with all applicable laws and regulations, which require York Hospital to be the decision maker. *E.g., National Labor Relations Board v. Shawnee Industries, Inc.*, 333 F.2d 221, 225 (10th Cir. 1964).

10. Weiss again does so by distorting the record. For example, Weiss quotes testimony that "the endorsement by the Medical Staff Committee virtually amounts to an endorsement by the Board" as supporting his proposition that the York Hospital Board of Directors served as a rubber stamp for decisions by committees of the York Medical Staff. RB at 18-19. By deleting half of the answer and quoting this testimony out of context, Weiss conceals that the "Medical Staff Committee" referred to in the testimony is a committee of the York Hospital Board of Directors, not a committee of the York Medical Staff.

IV. The unprecedented application of a per se rule to a hospital's staff privileges decision is legally unsupportable.

Weiss argues that this Court should not grant certiorari to review the York Medical Staff's per se arguments for three reasons.[11]

First, Weiss argues that the York Medical Staff did not preserve the per se issues below. RB at 13-14. Neither Weiss nor defendants extensively briefed the per se issues in the court of appeals because the court of appeals unexpectedly converted what the parties had mutually viewed as a rule of reason case into a per se case. The York Medical Staff's petition for rehearing in the court of appeals was, accordingly, the first opportunity the York Medical Staff had to brief the per se issues, and those issues were fully presented and preserved in that petition.

Second, Weiss disingenuously claims that the court of appeals' adoption of a per se rule was unnecessary to its decision because there is liability under the rule of reason. RB at 13-15. Applying the rule of reason, the jury found that any conspiracy to deny Weiss staff privileges was *not an unreasonable restraint of trade*. Jury's Response to Special Verdict Question No. 8. (6244a). Thus, as to Weiss, application of the rule of reason, instead of a per se rule, compels reversal of the court's finding of a violation of section 1 of the Sherman Act. This is particularly significant because the class's entire case is based upon the alleged discriminatory treatment of Weiss's staff privileges application and because Weiss (as the only osteopath who had ever applied for and been denied staff privileges at York Hospital) is the only osteopath who can even arguably state

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11. Weiss does not dispute that hospital staff privileges decisions are a form of industry self-regulation and that this Court's decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), therefore, compels use of the rule of reason.

a claim for damages as a result of the conduct challenged herein.[12]

Third, Weiss argues that this record contains no credible evidence of procompetitive justifications and that, therefore, this is a factually peculiar case. RB at 26-30. Yet, like Weiss, the plaintiffs in all staff privileges cases argue the absence of credible procompetitive, quality of care justifications supporting adverse staff privileges determinations. *See* Pet. at 3 n.2. The unique feature of this case is the court of appeals' unprecedented willingness to ignore the procompetitive justifications of record (and the absence of anticompetitive effects) and to adopt a per se rule. *See, e.g., Weiss v. York Hospital*, 745 F.2d 786, 797 n.18 (3d Cir. 1984) (A-18); Pet. at 4-7, 25-26; 4602a-4604a; 4744a-4745a; 5240a-5241a; 5893a-5894a; 5898a-5899a; 5909a-5913a; 5923a-5924a; 5956a-5958a; 5987a-5992a; 5995a-5999a; 6001a-6002a.

Assuming *arguendo* there had been evidence of anticompetitive effects, the task of weighing the credibility of the evidence and of balancing procompetitive effects against anticompetitive effects would be for the jury in the context of a rule of reason analysis. It is not a matter for the appellate courts in the context of fashioning a per se rule. *See Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398, 2399 (1984).[13]

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12. In its petition, the York Medical Staff also argued that the section 1 verdict in favor of the class could not be sustained under the rule of reason in light of the jury's finding that the York Medical Staff had no power to exclude competitors and the absence of any evidence that the practices or policies of the York Medical Staff had any effect on consumers. *See* Pet. at 27 n.30. Weiss does not dispute these arguments.

13. Weiss's claim that the jury has already rejected defendants' arguments regarding Weiss's professional competence and character is spurious. RB at 30 n.36. The court of appeals expressly held that "we cannot deem the issue of Weiss' professional competence and character as a defense to his claim for damages concluded," *Weiss*, 745 F.2d at 824 (A-79), and entered judgment accordingly. (A-130). Because Weiss has not cross-petitioned for certiorari on this point, he is foreclosed

V. The York Medical Staff's interstate commerce argument was presented to the court of appeals.

Weiss does not and cannot dispute that there is a circuit conflict as to the application of the "affecting interstate commerce" test. Nor does Weiss dispute that there is no evidence to establish the jurisdictional and substantive requirement of a "nexus" between any alleged antitrust violation and interstate commerce.

Weiss argues only that this Court should not resolve the circuit split, or correct the error of the court of appeals, because the York Medical Staff did not raise this interstate commerce issue below. Contrary to Weiss's argument, the precise issues presented to this Court were briefed and argued in the court of appeals:

> First, there was no evidence that any defendant other than York Hospital itself had any connection with interstate commerce. . . .
>
> . . . .
>
> [T]here is a total absence of evidence sufficient to establish the jurisdictional and substantive requirement of a "nexus" between any alleged violation and interstate commerce. Accordingly, the antitrust judgment against York [Hospital] and the [York Medical] Staff should be reversed . . . .

Brief for all Cross Appellees and Reply Brief for Appellants York Hospital, Medical and Dental Staff of York Hospital, Thomas L. Bauer, Ivan L. Butler, Samuel W. Deisher, and Lois M. Kushner at 38-39, *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984).[14]

NOTES *(Continued)*

from asserting it. *E.g., Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 620-21 n.14 (1985).

14. In addition, the absence of an effect on interstate commerce goes to the subject matter jurisdiction of the federal courts and, therefore, can be raised at any time.

VI. Conclusion.

For the foregoing reasons, as well as the reasons set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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